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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BELLEVUE FIRE FIGHTERS LOCAL 1604,
INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, AFL-CIO, CLC,
an unincorporated voluntary association;
RON PEDEE, and WILLIAM P. SPIETH,
Petitioners,

vs.

CITY OF BELLEVUE, a municipal corporation,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF OF PETITIONER

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1. Introduction.

In the Brief of Respondent in Opposition to the Petition for a Writ of Certiorari, respondent concedes that attorneys' fees

may be granted under 42 U.S.C. § 1988 on a claim under state law, where that claim arises from facts that would also create a substantial claim under appropriate federal law. Respondent's Brief, p. 3.

Respondent argues, however, that "the only existing judicial determination" of petitioners' constitutional claims is the denial of those claims by the superior court that, respondent states, the Washington Supreme Court "declined to disturb . . . on appeal." Id., p. 8. Respondent also asserts that petitioners' constitutional claims are not substantial in view of Wachsman v. City of Dallas, 704 F.2d 160 (5th Cir. 1983), cert. denied, 104 S.Ct. 537 (id., pp. 8-9). Finally, respondent contends that "[n]o conceivable public policy could be advanced" by treating petitioners' claims as substantial (id., p. 10).

Pursuant to Rule 22.5 of this court, each of these arguments is addressed below.

2. The Trial Court's Ruling on Petitioners' Constitutional Claims was Reversed by the Supreme Court of Washington.

The dispositive statement by the Supreme Court of Washington in this case is that "[t]he trial court is reversed." Appendix to the petition herein, p. 19a (hereafter "App."). Although the court ruled that it "need not and do[es] not reach" petitioners' constitutional claims regarding free speech and association, vagueness and overbreadth, and equal protection (App. 17a-18a), its reasoning in support of its interpretation of RCW 41.06.250 expressly deals with these constitutional concerns.

The court below reasoned that the res-

pondent's interpretation of RCW 41.06.250 would produce "absurd consequences" by recognizing a distinction between partisan political activities that are protected by the statute and nonpartisan political activities that respondent urged could be restricted,[1] and create "meaningless dis-

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[1]The court stated:

> We take judicial notice of the fact that some political subdivisions, like King County, conduct partisan campaigns, whereas others, like City, conduct nonpartisan campaigns. Under City's interpretation of RCW 41.06.250, King County could prohibit its employees from participating in nonpartisan campaigns for office in other political subdivisions, but would have to allow employee participation in its own partisan campaigns. Meanwhile, City could prohibit employee participation in its nonpartisan campaigns for Bellevue city council, but could not in any way restrict its employees' partisan political activity. A statute must be given a reasonable construction to avoid absurd consequences such as these.

App. 12a-13a, emphasis in last sentence added.

tinctions between permitted and nonpermitted political activity . . . ."[2] Rejecting the

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[2]The court stated:

> The creation of meaningless distinctions between permitted and nonpermitted political activity is yet another absurd consequence of City's interpretation of RCW 41.06.250.
>
> * * *
>
> Assuming for the sake of argument that RCW 41.06.250 did not preempt BCC 3.90.050(B), employees would be faced with the task of determining which activities were "permissible" expressions of opinion, and which were "impermissible" participations in the political management or campaign of a candidate for Bellevue city council.
>
> The Bellevue City Manager attempted to resolve this problem by issuing a memorandum setting forth examples of what City employees could and could not do[.]
>
> * * *
>
> Pursuant to the City Manager's memorandum, a City employee could post a campaign sign in his yard;

likelihood that the legislature could have intended such "absurd consequences" and "meaningless distinctions" among permitted and nonpermitted political activities, the court concluded,

> We doubt that the Legislature intended that such artificial distinctions be drawn, or that the City Manager be the final arbiter of the exercise of constitutional rights of free speech and association.

App. 16a, emphasis added.

Artificial distinctions in the otherwise permissible regulation of free speech

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> however, he would be subject to civil and criminal sanctions under BCC 3.90.060 if he painted that same campaign sign in the privacy of his own home on behalf of a "campaign organization." He could express his verbal opinion on a council candidate to his fellow citizens, but not from behind a podium at a campaign rally.

App. 13a-16a.

and association also violate constitutional guarantees of equal protection. See, e.g., Carey v. Brown, 447 U.S. 456 (1980); Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).

In view of the court's reasoning concerning "constitutional rights of free speech and association" and their bearing on the proper construction of RCW 41.06.250, this Court should reject respondent's assertion that the state supreme court "declined to disturb" the ruling of the trial court on petitioners' constitutional claims. Such an assertion also carries the unreasonable implication that, notwithstanding the "meaningless distinctions" and "absurd consequences" resulting from the trial court's judgment, the Washington Supreme Court intended to allow the reversed judgment to serve as precedent on constitu-

tional issues it determined that it did not need to reach.

3. The Petitioners' Constitutional Claims Were Properly Recognized by the Supreme Court of Washington As Substantial.

As is apparent from the discussion in Part 2 above, the Washington Supreme Court recognized the substantiality of petitioners' constitutional claims concerning free speech and association, vagueness and overbreadth, and equal protection. Respondent argues, however, that relief on these claims would have to be denied under earlier decisions of this Court, citing United Public Workers v. Mitchell, 330 U.S. 75 (1947); United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548 (1973); and Broadrick v. Oklahoma, 413 U.S. 601 (1973). In those

decisions the Court upheld against constitutional challenge certain restrictions on partisan political campaign activities by civil service employees of the United States and the State of Oklahoma.

Two federal courts of appeals and one federal district court have interpreted these three decisions to permit restrictions only on certain partisan political activity. Alderman v. Philadelphia Housing Authority, 496 F.2d 164 (3rd Cir. 1974), cert. denied, 419 U.S. 844; Magill v. Lynch, 560 F.2d 22 (1st Cir. 1977), cert. denied, 434 U.S. 1063; Arden v. Village of Oak Lawn, 537 F.Supp. 181 (N.D. Ill. 1982). Another federal court of appeals has reached a conflicting result. Wachsman v. City of Dallas, supra.

A conflict on a constitutional issue among the federal courts of appeals is one

hallmark of substantiality. Cf. U. S. Supreme Court Rule 17.1(a). Moreover, in light of the protection granted by the Washington Legislature to the partisan political activities of all state and local governmental employees, this case posed far graver questions concerning constitutional equal protection guarantees than were raised in Mitchell, supra; Letter Carriers, supra; or Broadrick, supra.

By its reliance on Wachsman, supra, the respondent in effect invites this Court to resolve summarily a constitutional issue that it has three times declined to accept for review, and the merits of which have been rendered moot in this case by the decision of the Washington Supreme Court. It was to avoid precisely such an invitation, where only attorneys' fees remained at issue in civil rights cases, that

Congress determined to grant fees under § 1988 to parties who have prevailed on non-fee-producing claims.

4. Policy Concerns Require that Petitioners' Claims be Treated as Substantial.

Respondent states (p. 5) that [t]rial in a federal court of a case such as the one at bar will always imply that a court has determined that a substantial federal question is presented", and that "[a] state court's decision not to award attorney's fees does not necessarily include such a ruling . . . ." It is precisely for that reason that, unless certiorari is granted in this case and the decision below reversed, civil rights plaintiffs will have no choice but to bring their complaints in federal court, in order that success on their state law claims will not result in a denial of

their attorneys' fees.

Yet, as the circumstances of this case demonstrate, the state courts are better tribunals in which to litigate claims that can be resolved by interpreting state law and avoid unnecessary federal constitutional decisions. At the time this action was brought, RCW 41.06.250(2) had never been interpreted by a state court in any reported decision. The state attorney general had published an opinion, however, that the statute permitted municipalities to regulate the nonpartisan election campaign activities of their employees (App. 4a, fn. 1).

Under these circumstances, a federal district court might have been unwilling to interpret the statute to preclude such regulation. If so, it would have been

required either to decide the constitutional issues that the state court found unnecessary to reach, or to abstain pending an authoritative state court determination. Thus the resolution of the statutory issues and the prompt disposition of this case on non-constitutional grounds was facilitated by bringing it in the state court in the first instance.

Civil rights plaintiffs like petitioners should not be discouraged from bringing cases with both constitutional and state law issues in the state courts. Not only are the state courts better able to adjudicate the state law claims, but they are also fully capable of evaluating the substantiality of the federal claims presented in connection with requests for attorneys' fees under § 1988.

5. Conclusion.

For the reasons stated herein and in the Petition for a Writ of Certiorari, the petition should be granted, the decision below vacated, and the case remanded to the Washington Supreme Court for reconsideration in light of Maher v. Gagne, 448 U.S. 122 (1980).

Alternatively, the Court should grant the petition and set the case down for plenary review.

Respectfully submitted,

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